MOTION FILED
FEB 1 1996

No. 95-1051

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND
AMERICAN LIFESTYLES, INC.,
Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, ACROMED CORPORATION, THE ALLEN GROUP, AMERICAN GREETINGS CORPORATION, ELSAG BAILEY, INC., M.A.HANNA COMPANY, NACCO INDUSTRIES, INC., PARKER HANNIFIN CORPORATION, AND THE SHERWIN-WILLIAMS COMPANY AS AMICI CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN TORT REFORM ASSOCIATION, ACROMED CORPORATION, THE ALLEN GROUP, AMERICAN GREETINGS CORPORATION, ELSAG BAILEY, INC., M.A. HANNA COMPANY, NACCO INDUSTRIES, INC., PARKER HANNIFIN CORPORATION, AND THE SHERWIN-WILLIAMS COMPANY AS AMICI CURIAE IN SUPPORT OF THE PETITION

The American Tort Reform Association, Acromed Corporation, The Allen Group, American Greetings Corporation, Elsag Bailey, Inc., M.A. Hanna Company, NACCO Industries, Inc., Parker Hannifin Corporation, and The Sherwin-Williams Company (collectively, "*amici*") hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has declined to consent.

The American Tort Reform Association is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The eight corporate *amici* are American corporations — some large, others small; most, but not all, publicly traded — who, as actual or potential defendants of punitive damages claims, have a common interest in ensuring that courts provide effective and meaningful review of punitive damage awards.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages awards is an issue of vital importance to *amici*. *Amici* continue to be alarmed by the number of cases in which enormous, crippling punitive damage awards are levied by juries, yet are upheld with little or no rational analysis offered by the courts.

Consequently, *amici* are interested in the central question presented by this case — what sort of appellate review of punitive damage awards is required by the Due Process Clause. That question is an important one by any standard. In this case the Colorado courts upheld a $6 million award, based on a novel legal theory, against the petitioner, a small corporation. The state courts in this case offered no reason why such a harsh sanction was necessary or appropriate. *Amici* therefore have an interest in assuring that courts will effectively review and enforce the substantive limit on the size of punitive awards which is imposed by the Due Process Clause.

Amicus The American Tort Reform Association can, because of its nationwide constituency, provide this Court with a unique perspective on these issues and offer additional arguments underscoring the importance of this Court's review. The eight corporate *amici* are able to offer the perspective of individual businesses threatened with punitive damages. Additionally, *amicus* The American Tort Reform Association has, in other cases involving the constitutionality of punitive damage awards, demonstrated its interest in these issues by filing *amicus* briefs in this Court. *See, e,g., BMW of North America, Inc. v. Gore,* 115 S. Ct. 932 (1995) (granting writ of certiorari); *Honda Motor Co. v. Oberg,* 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991).

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petition for certiorari.

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INTEREST OF THE AMICI CURIAE

The American Tort Reform Association ("ATRA"), founded in 1985, is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The eight corporate *amici* — Acromed Corporation, The Allen Group, American Greetings Corporation, Elsag Bailey, Inc., M.A. Hanna Company, NACCO Industries, Inc., Parker Hannifin Corporation, and The Sherwin-Williams Company — are American corporations. Some are large corporations, others consider themselves small corporations. Most are publicly traded, but one is privately held. However, these corporations, as actual or potential defendants of punitive damages claims, have a common interest in ensuring that courts provide effective and meaningful review of punitive damage awards.

The central issue presented in this case — what sort of appellate review of punitive damage awards is required by the Due Process Clause — is a matter of substantial concern to each of these *amici*. *Amici* continue to be alarmed by the number of cases in which enormous, crippling punitive damage awards are levied by juries, yet are upheld with little or no rational analysis offered by the courts. *Amici* are therefore vitally interested in assuring that courts will effectively police and enforce the "substantive limit on the size of punitive damage awards" which the Due Process Clause imposes. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994).

I. THE ISSUE PRESENTED IS IMPORTANT AND RECURRING

This case presents an important and often recurring issue which is potentially presented by every punitive damage case litigated in the United States. While it is established that states must provide appellate review of the amount of punitive damages awarded by a jury to satisfy Due Process, *Honda*, 114 S. Ct. at 2341, the Court has yet to establish what sort of appellate review satisfies Due Process. The central question presented by this case is

whether the Due Process Clause requires close, meaningful appellate review of punitive damage awards, in which the appellate court articulates reasons why such awards comport with Due Process principles.

The failure of appellate courts to effectively review the size of punitive damage awards is a pervasive and recurring problem. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), Justices O'Connor, White and Souter noted that in "case after case" involving enormous sums of punitive damages awarded by juries, "review has been inadequate or absent altogether." *Id.* at 2742 (O'Connor, J., joined by White and Souter, JJ., dissenting).

Indeed, until *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994), Oregon was altogether denying judicial review of the size of punitive damage awards. *See id.* at 2341. Oregon's appellate review procedures allowed the state's appellate courts to review punitive awards only for sufficient evidence, and foreclosed judicial review of the size of punitive damage awards. Despite the presence of trial-level and post-trial safeguards, this Court found the denial of appellate review unconstitutional: "Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment." *Id.*

In spite of the decision in *Honda*, the problem identified by Justice O'Connor in *TXO* — "inadequate or absent" appellate review — continues to this day. Appellate courts are repeatedly providing little if any meaningful appellate review to punitive damage awards. Several post-*Honda* examples bear this out.

In *Washington v. Whitaker*, 451 S.E.2d 894 (S.C. 1994), a civil-rights case, a jury awarded three plaintiffs actual damages of $1,000, $1,000, and $1,500, respectively. However, the jury awarded punitive damages of $75,000 to each plaintiff ($225,000 total) against the city, and $5,000 per plaintiff ($15,000 total) against an individual police officer. Defendants appealed. After noting that the trial judge had conducted a post-trial review and

determined that the award was appropriate, the South Carolina Supreme Court stated, simply:

> We affirm his findings as to punitive damages.

Id. at 898. The South Carolina Supreme Court did not offer any further rationale for the affirmance.

The Supreme Court of Appeals of West Virginia recently affirmed a punitive damage award on a similar absence of reasoning. In *Tanner v. Rite Aid of West Virginia, Inc.*, 461 S.E.2d 149 (W. Va. 1995), the court in affirming offered the following conclusion:

> After reviewing the record as a whole in the light most favorable to the Appellees, we cannot say that respective awards for $12,000 in compensatory damages and $18,000 in punitive damages meet the required standard for remand.

Id. at 162. The court did not in any way explain why it could not say that the award was excessive.

Similarly, in *Sessums v. Northtown Limousines, Inc.*, 664 So. 2d 164 (Miss. 1995), the jury in an odometer roll-back/consumer fraud case awarded plaintiffs $5,230 in actual damages and $100,000 in punitive damages. On appeal, the Mississippi Supreme Court affirmed, offering no more analysis than this:

> Given the facts of this case and the need to deter Sessums and others from engaging in a similar course of conduct in the future, we cannot say the jury's award of $100,000.00 in punitive damages was excessive.

Id. at 170.

And in a recent federal case, *Johansen v. Combustion Engineering, Inc.*, 67 F.3d 314 (11th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3486 (Jan. 4, 1996) (No. 95-1072), a $15 million punitive damage award resulted in this opinion from the Eleventh Circuit:

> PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

See id.[1]

The absent analysis offered by these courts does not comport with Due Process. This Court has stressed, above all, that one of the principal limits on punitive awards imposed by the Due Process Clause is that such awards must be reasonable in scope in light of their purposes. *See, e.g., Pacific Mut. Life Ins. Co Haslip*, 499 U.S. 1, 18, 22, (1991). In the present case, as in the cases discussed above, defendants were held liable for punitive damages — often for huge sums — yet the appellate courts offered no rational reason for the award. When an appellate court does not — or cannot — explain why the award is "reasonable," Due Process is simply not satisfied. Certiorari should be granted to consider this important and recurring issue.

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[1] The problem of inadequate appellate review is not limited to jury trials, but infects appeals from bench trials as well. In *Okocha v. Fehrenbacher*, 655 N.E.2d 744 (Ohio Ct. App. 1995), an appeal from a trial court's award of $50,000 in punitive damages (on top of a jury award of $5,945.23 in actual damages), the Court of Appeals of Ohio recited the generally applicable standards for punitive damages, and concluded simply that "[w]e find no evidence that the trial court abused its discretion in awarding damages." *Id.* at 753.

And in a most remarkable case, *Pridemore v. Cherry*, 903 S.W.2d 705 (Tenn. Ct. App. 1995), the defendants in a civil fraud case appealed from a court award of $25,000 in punitive damages. The appellate court held that the chancellor had properly decided to award punitive damages, and then proceeded to quote the list of nine factors for setting the amount of punitive damages, announced by the Tennessee Supreme Court in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992). Without any analysis, the appellate court decided to *increase* the punitive award by four times:

> Based upon the enumerated factors, we find that the punitive damages award should be increased from $25,000.00 to $100,000.00. The record fully supports such an increase. Defendants' conduct in this case is reprehensible, and as such, plaintiff is entitled to punitive damages in the amount of $100,000.00.

Pridemore, 903 S.W.2d at 709.

II. CLOSE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS IS CRITICAL AND REQUIRED BY DUE PROCESS.

As applied to punitive damages, the law of Due Process has evolved significantly over the past several years. *See, e.g., Honda*, 114 S. Ct. 2331; *TXO*, 113 S. Ct. 2711; *Haslip*, 499 U.S. at 18 (1991); *see also BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995).

Out of those decisions come some basic principles. *One*, the Due Process Clause "imposes a substantive limit on the size of punitive damage awards" (*Honda*);[2] *two*, although this Court has yet to give many contours to that "substantive limit," it does mean, among other things, that punitive damages must not be "greater than reasonably necessary to punish and deter" (*Haslip*); *three*, whether an award is "greater than reasonably necessary to punish and deter" is a case-specific inquiry which must be made with due regard for the facts of the case (*TXO*); and *four*, effective appellate review must be provided in order to assure that the punitive award does not cross the substantive line between appropriate and excessive (*Honda*).

Petitioners have shown convincingly that the procedural guarantees of the Due Process Clause go far in policing this limit. In particular, Due Process requires courts to give punitive awards a "close," effective appellate review so that this substantive limit is not exceeded. Pet. 18-22. Thus, as Petitioners have explained, this Court has leaned heavily on the procedural guarantees of the Due Process Clause to ensure that the substantive component of that Clause is not violated by large punitive damage awards. This is confirmed by the Court's more general Due Process precedents.

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[2] *See also, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-19 (1993) (plurality opinion); *id.* at 2731 (O'Connor, J., dissenting); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

This Court has often used the three-part inquiry of *Mathews v. Eldridge*, 424 U.S. 319 (1976) "as 'a general approach for testing challenged state procedures under a due process claim.'" *Medina v. California*, 112 S. Ct. 2572, 2576 (1992) (quoting *Parham v. J.R.*, 442 U.S. 584, 599 (1979)). Significantly, *Mathews* is regularly applied to civil forfeitures,[3] where — just as with punitive damages — there is an inherent risk that property will be taken without Due Process. *Compare United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 515 & n.1 (1993) (Thomas, J., concurring in part and dissenting in part) *with, e.g., Honda*, 114 S. Ct. at 2340; *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring).

Under the test set forth in *Mathews*, the courts consider three factors to determine whether procedural safeguards are adequate to provide Due Process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures [currently] used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Each of the three components of *Mathews* indicates that Due Process is violated when courts fail to provide close review of large jury awards of punitive damages, as was the case here.

1. The Private Interest Is Substantial. There can be no question but that the monetary "private interest" affected in this case — and indeed in most punitive damage cases — is substantial. Punitive awards are often "enormous." *See, e.g.,*

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[3] *See, e.g., United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501-04 (1993).

Haslip, 499 U.S. at 54, 61 (O'Connor, J., dissenting); William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459, 462 n.17 (1992).

Effective, "close" appellate review becomes more critical as the punitive award becomes more onerous: As then-Judge Posner has said of punitive damages, "The heavier the sanction, the more confidence there should be that it is justified." *Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990). Here, the jury ordered that a substantial sum — six million dollars — be taken from Petitioners and given to Respondents. Under any standard, that award is "substantial," and deserving of close appellate review.

2. The Absence Of Effective Review Carries A High Risk Of Erroneous Deprivation. The procedures utilized by the Colorado courts — here, in truth, the *absence* of procedures — carried with them a high risk of "erroneous deprivation." As explained by the Court in *Honda:*

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts . . . Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.

Id. at 2340-41. Thus, as the Court explained in *Honda*, appellate review is critical to any fair and rational system of punitive damages. Without such review comes an "acute danger" that excessive jury awards will be left standing.

The cases are legion in which juries have run amok in awarding huge punitive sums bearing no rational relationship to the goals of punishment and deterrence. So long as juries award punitive damages, some juries will misstep and award disproportionate punitive damages beyond the "substantive limit" of the Due Process Clause. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *TXO Prod. Corp. v. Alliance*

Resources Corp., 113 S. Ct. 2711, 2723 (1993) (Stevens, J., joined by Rehnquist, C.J. and Blackmun and Kennedy, JJ.); *id.* at 2738 (O'Connor, J., joined by White and Souter, JJ., dissenting). The cure for such missteps is in the hands of judges, who alone can provide the procedural protections which ensure that punitive awards fall within the substantive limits of the Due Process Clause.

But where the appellate review is effectively absent, as it was here and in the cases discussed in Section I above, such thin review is no more of a "procedural safeguard" than no review whatever. When an opinion is essentially silent, as the court of appeals' opinion was here, there can be no assurance that effective appellate review (and therefore Due Process) was given. As Professor James Boyd White has suggested, if courts did not issue opinions, courts would be perceived as "actors in a voiceless bureaucracy, silent figures ruling the lives of others, never explaining themselves, in a system that Kafka might recognize as his own." James Boyd White, *What's an Opinion For?*, 62 U. Chi. L. Rev. 1363, 1364 (1995).[4] It goes almost without saying that a Kafkan, "voiceless bureaucracy" is not synonymous with Due Process.

So it was in this case. Petitioners had a substantial portion of their business cut out by a Colorado jury — and no Colorado judge has yet offered a rational explanation why that should have been so. Here is the totality of what Colorado courts have said on the merits of Petitioner's Due Process challenge to the crippling $6 million punitive damage award which the jury levied against it:

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[4] *See also* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1372 (1995) (one reason judges write opinions is "to demonstrate our recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike").

- **Trial Court:** "Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied." (Pet. App. 19a)

- **Court of Appeals:** "We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution." (Pet. App. 15a)

- **Supreme Court:** "IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED." (Pet. App. 17a)

Nowhere did any Colorado court offer a rational explanation of why a $6 million punitive award against a $29 million company was reasonable and no greater than necessary to accomplish the goals of punishment and deterrence.

Indeed, the court of appeals appeared to hold that no appellate review for excessiveness is required so long as the punitive award does not exceed the actual damage award.[5] But it is no answer to say that so long as the ratio of compensatory to punitive damages falls within statutory limits, no appellate review is required. Certainly, punitive awards which satisfy the statutory ratio may still be excessive given the circumstances of the case — such as here, where Petitioners' liability for *compensatory* damages was premised on an issue of first impression in Colorado which had been decided contrarily in every other jurisdiction. *See* Pet. 6 & n.4; 11-13.

Judges, through the mechanism of close post-verdict review, are the only protection against violations of Due Process. Certainly, the jury cannot be expected to assess the constitutionality of its own awards or evaluate whether their own

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[5] Colorado caps the amount of punitive damages in most cases to the amount of compensatory damages. Colo. Rev. Stat. 13-21-102(1)(a). *See also* Pet. 20.

award is prejudicial. And the jury is not institutionally suited to do so: Juries are particularly ill-equipped to determine when a penalty furthers the state's legitimate goals. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 (1984); David Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).[6] Thus, judges must closely review punitive damage awards to ensure that they comport with substantive Due Process and are not subject to prejudice.

Indeed, *not* providing effective appellate review is presumptively unconstitutional. As this Court explained in *Haslip*,

> Under the traditional common-law approach, *the amount* of the punitive award is initially determined by a jury . . . . The jury's determination is then reviewed by *trial and appellate courts* to ensure that it is reasonable.

Haslip, 499 U.S. at 15 (emphasis added). The fact that Colorado's trial and appellate courts all but abandoned their "traditional common-law" role is further confirmation that Petitioners were deprived of Due Process. *Honda*, 114 S. Ct. at 2339 (a State's "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").

"When . . . absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Honda*, 114 S. Ct. at 2340 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*,

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[6] "Probably, many on jury panels can not think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punishment as legal, justifiable revenge." Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

333 U.S. 257 (1948); and *In re Winship*, 397 U.S. 358, 361 (1970)).

3. Effective Appellate Review Is Minimally Burdensome To The Government And Not Burdensome At All To The Opposing Party. The final factor in the *Mathews* calculus is the burden that would be worked upon the state, or on the opposing party (*see Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991)), by providing close appellate review.

Neither plaintiffs, nor the State of Colorado, would be significantly burdened were the appellate courts to provide close appellate review of punitive damage awards. Certainly plaintiffs have no cognizable interest in preserving awards that are constitutionally excessive. And the courts, which issue opinions as a matter of course, would be minimally, if at all burdened by adding a brief, reasoned explanation for reaching the decisions that they do. Even if close appellate review was said to work a minor burden upon the courts, a state's interest in economy is "necessarily tempered by [the State's] interest in . . . fair and accurate adjudication." *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

Close appellate review has an added benefit: It aids the work of reviewing courts by allowing the higher court to understand the reasoning of the lower one. *See* Pet. 19; *see also Lawrence v. Chater*, 64 U.S.L.W. 3460, 3461 (U.S. Jan. 8, 1996) (noting that the failure of lower courts to issue opinions often requires this Court to GVR). And, as pointed out by Petitioners, the requirement of a reasoned decision serves two other goals: One, it has "a disciplining effect on courts" (Pet. 21) which ensures that irrational decisions are not reached; two, reasoned explanations further public confidence in the jury and court systems. (*Id.*)

Requiring appellate courts to issue reasoned explanations for their decisions would be a minimal, if any, burden on state courts. The attendant benefits, however, would be great. Thus, certiorari should be granted to make explicit what was implicit in *Honda*: The Due Process Clause's requirement of appellate

review of punitive damage awards means that the review provided must be reasoned and effective.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

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